APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- **763**

WALTER S. BRACKETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

Opinion of the Court of Appeals *en banc*, July 18, 1977

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1495

UNITED STATES OF AMERICA

v.

WALTER S. BRACKETT,
Appellant

ON REHEARING EN BANC

Argued November 17, 1976

Decided July 18, 1977

Larry P. Ellsworth (appointed by this court) for appellant.

Mark H. Tuohey, III, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney and *John A. Terry*, Assistant United States Attorney were on the brief, for appellee.

Before: BAZELON, *Chief Judge*, WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*, sitting *en banc*.

Opinion for the court by *Circuit Judge* MCGOWAN, in which *Circuit Judges* WRIGHT, TAMM, LEVENTHAL, and WILKEY join.

Separate concurring opinion by *Circuit Judge* MACKINNON, in which *Circuit Judge* ROBB joins.

Dissenting opinion by *Chief Judge* BAZELON, in which *Circuit Judge* ROBINSON joins.

MCGOWAN, *Circuit Judge*: In this appeal from the denial by the District Court of appellant's motion for collateral relief under 28 U.S.C. § 1255, the court *en banc* addresses the single issue of the retrospective reach of *Dorszynski* v. *United States*, 418 U.S. 424 (1974).

I

In 1960 appellant, then an inmate of the National Training School for Boys, assaulted a guard in an attempt to escape, and was indicted for first degree murder. Juvenile Court jurisdiction was waived, and appellant pleaded guilty in the District Court to manslaughter. On March 10, 1961, he came before the court for sentencing. Since he was then 15 years of age and therefore eligible for sentencing under the Federal Youth Corrections Act, 18 U.S.C. § 5010, his counsel requested that he be considered for sentencing under that statute. After observing that youth "is not a mitigating circumstance" so far as the crime in question was concerned, and that appellant and his co-defendant were "really murderers" who had been allowed to plead guilty to a lesser charge, and who had prior bad records, the judge denied counsel's request in these terms:

> Now, obviously this is not a case for the Youth Corrections Act, both because of the nature of the offense and the nature of the prior records of these defendants. The court is more interested in the fate that befell the guard than it is in the future of these two boys.
>
> * * * *
>
> Now, Brackett has shown vicious tendencies. In addition to plotting the escape plan involved in this case, after he pleaded guilty he tried to escape from the Marshal's van. He needs incarceration in a maximum security institution.

An adult sentence of 5 to 15 years was thereupon imposed; and no appeal was taken.

On December 10, 1969, appellant filed in the District Court a *pro se* motion under § 2255. Although counsel was appointed for him, no action of any kind appears to have been taken until 1974 when appellant *pro se* filed a second § 2255 motion in this court. That was returned to appellant with notification that the District Court was the proper place for filing. When he again submitted his motion to this court, it was referred to the District Court for disposition, where it was denied without a hearing as raising no meritorious issue. A division of this court affirmed without opinion.

Although a number of issues had been raised in the District Court and on appeal, appellant's petition for rehearing and suggestion for rehearing *en banc* asserted only that appellant had been improperly denied Youth Corrections Act treatment because there had been no express finding, as required by *Dorszynski*, that appellant would derive no benefit from such treatment. Because of our concern that, as alleged by appellant, divisions of this court may not have been applying *Dorszynski* uniformly, the appeal was placed *en banc*, as our order stated, "for the purpose of considering whether (*Dorszynski*) shall be applied retroactively . . ."

II

The requisite manner of implementation of § 5010(d) of the Youth Corrections Act had heavily engaged the attention of this court prior to *Dorszynski*. That section provides that an adult sentence may be imposed "[I]f the court shall find that the youth offender will not de-

rive benefit from treatment" under the alternatives provided by the Act.[1] In *United States* v. *Waters*, 437 F.2d 722, 725 (1970), we said that the sentencing judge's discretion to impose an adult penalty "is circumscribed by the findings of fact in the individual case which the District Judge is required to make *either explicitly or implicitly*." (Emphasis supplied). And this necessity of an affirmative finding of no benefit, albeit in either express or implied terms, was reasserted by this court in *United States* v. *Ward*, 454 F.2d 992 (1971).

In *United States* v. *Coefield*, 476 F.2d 1152 (1973), we examined the issue *en banc*. The result of that inquiry was a holding that the finding of no benefit must be explicit and not left to implication, together with the addition of a new requirement that the judge making such a finding must state the reasons which impelled him to do

[1] Those alternatives are three in number. One is probation (Section 5010(a)). A second (Section 5010(b)) is commitment to the custody of the Attorney General for treatment and supervision pursuant to the Act, in which event § 5017(c) provides that the defendant must be conditionally released under supervision within four years, and unconditionally discharged within six years. The third (Section 5010(c)) is, upon a finding that maximum benefit from YCA treatment may not be derived within six years, commitment to the custody of the Attorney General for any further period otherwise authorized by law for the offense in question. In this third alternative, Section 5017(c) requires that there shall be conditional release under supervision not later than two years prior to expiration of the term imposed, with unconditional release possible within one year thereafter; and unconditional discharge in any event must occur on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction. Sections 5017(a) and (b) provide that any committed youth offender *may* be released at any time under supervision, and *may* be unconditionally discharged at the expiration of one year thereafter.

A youth offender is defined by the Act as a person under 22 years of age at the time of conviction. The Young Adult Offenders Act, 18 U.S.C. § 4209 (1970), provides that a defendant aged 22 to 26 may be sentenced under the Youth Corrections Act if "the court finds that there is reasonable grounds to believe that the defendant will benefit" therefrom.

so. *Dorszynski* dispensed with this enlarged requirement of the articulation of reasons, but, as we had done in *Coefield*, held that the no-benefit finding must be explicit rather than implicit. In this latter regard, the Supreme Court stopped short of saying that the finding must track the statute *in haec verba*, but it did say (at p. 444) that the required quality of explicitness must be imparted by language "that makes clear the sentencing judge considered the alternative of sentencing under the Act and decided that the youth offender would not derive benefit from treatment under the Act."

When the present appeal was before a division of this court, the issue was joined in terms of whether the sentencing judge in fact met the standards subsequently set in *Dorszynski*. Appellant continues *en banc* to assert that the judge gave no consideration whatever to the possibility of affording appellant Youth Corrections Act treatment. This argument is not literally germane under the terms of our *en banc* grant, but the varying doctrinal development that has occurred over time in this court prompts us to take note of the situation as we see it.

The record reveals that the sentencing judge was clearly aware of the Youth Corrections Act and of appellant's eligibility as a matter of age for disposition under it. The comments made by him seem to us of such a nature as to constitute an implicit finding of no benefit within the meaning of the relevant statutory provision, and of our later interpretation of it in *Waters* and *Ward*.[2] They

[2] The sentencing judge's extensive references to (i) the serious nature of the assault, (ii) the prior criminal involvement of appellant, and (iii) appellant's attempt to escape, are both relevant to, and supportive of, an implication that the court was asserting its conviction that appellant would not respond to YCA treatment and would only disrupt the program with no benefit to himself. The judge's further professions of a seeming unconcern with appellant's rehabilitation argue for a different interpretation of his

were not, in our view, adequate to meet the higher standards of explicitness prescribed by this Court in *Coefield*, and more importantly by the Supreme Court in *Dorszynski*. These premises, are, thus, the point of departure for our consideration of the retroactivity issue framed by our *en banc* order.

III

Aged 15 at the time he was sentenced, appellant is now 31. In the intervening years, the sentencing judge has died, and appellant has twice been released on parole by the federal authorities, but each parole was subsequently revoked for parole violation. Released again in 1975 to the custody of South Carolina, he is presently out on parole from a South Carolina sentence of ten years for a criminal violation in that state. In his brief *en banc*, appellant asserts that, in the "unique facts presented by this case," resentencing under the Youth Corrections Act could only take the form, not of exposure to rehabilitative supervision, but of a release from further obligation under his federal sentence. This, so it is said, flows from the fact that the maximum sentence that can be given under YCA equals the maximum adult sentence, and time on parole is credited even if parole was subsequently revoked. Appellant received the maximum adult sentence of 15 years, and he has already served more than 15 years if his time out on parole is credited, which it is not in respect of an adult sentence but is under a YCA sentence.

We do not pursue this question of the precise relief to which appellant might be entitled if a remand for YCA sentencing were to be ordered, except to remark that, as envisioned by appellant, it does not entail his involuntary subjection to the improving influences of the Youth Cor-

---

ruling, but we do not find them, in the entire context, inconsistent with a no-benefit conclusion.

rections Division. We think, rather, that the facts giving rise to the claim are significant only as they illuminate the policies relevant to retroactivity. Those policies have been identified by the Supreme Court as involving three factors: (1) the purpose to be served by the new standards, (2) the extent of reliance by public authorities on the old, and (3) the effect of retroactivity on the administration of justice. *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967).

The objective of the Supreme Court in its ruling in *Dorszynski* was to assure that the sentencing judge will give conscious consideration to YCA treatment for youthful offenders who might, because of the very fact of their youth, be saved from a life of crime by the youth-oriented treatment provided by Congress to this end in the YCA. Congress prescribed the age limits for that particularized rehabilitative effort. Appellant has long since exceeded them, as will have many, if not indeed most, others who collaterally challenge their sentences. This court confronted a similar problem in *Mordecai* v. *United States*, 421 F.2d 1133 (1969), *cert. denied*, 397 U.S. 977 (1970). There we refused to give retroactive application to the holding in *Kent* v. *United States*, 383 U.S. 541 (1966), in a collateral attack by a prisoner who had not been afforded the hearing required by *Kent* before a juvenile offender is waived for adult trial. In doing so the court noted the fact that the defendant was no longer a juvenile, and that no remedy was currently available to tap the rehabilitative potential of youth, stating (at 1138) that "even if nonpunitive rehabilitation in the juvenile process would have been the proper path in 1961, society can no longer offer what was then, rightly or wrongly, denied . . ."

The reliance interest in these circumstances is perhaps of less significance, although it is likely that the sentencing judge's action in this instance was not out of keeping

with what were considered to be a sentencing judge's responsibilities at the time this sentence was imposed, and indeed as they were later defined to be by this court in *Waters* and *Ward*. The statute in question had been on the books for 24 years before the Supreme Court authoritatively prescribed the manner of its implementation. The varying and, as it turned out, not wholly successful development of implementation doctrine in our own court demonstrates the several faces which the statutory language apparently presented to individual judges, especially those charged with the traditionally awesome responsibility of criminal sentencing.[3]

With respect to the effect upon the administration of justice, there are obvious problems in deciding anew the delicate question of susceptibility to YCA treatment many years—in this case, 16—after the initial sentence. Not infrequently, as here, the sentencing judge will no longer be available. The task of recreating the conditions under which the first sentence was imposed holds the threat of more administrative burdens on a criminal justice system that is already overloaded. And surely those charged with the intensely important work of trying to save truly youthful offenders from blighted lives will not be aided by the prospect of the appearance among their charges of persons who have matured beyond the statutory age limits in the criminal environment.[4]

---

[3] Limitations on retroactivity are not, of course, confined to constitutional holdings. *See* Halliday v. United States, 394 U.S. 831 (1969). In concluding not to give retroactive application to an interpertation by it of Rule 11, FED. R. CRIM. P., McCarthy v. United States, 394 U.S. 459 (1969), the Court stated (at 832) that it approached the problem by reference to "the same criteria we have employed to determine whether constitutionally grounded decisions that depart from precedent should be applied." *And see* Judge Leventhal's useful discussion of the concept of reliance in his concurring opinion in *Mordecai, supra*.

[4] As an appendix to his brief *en banc*, appellant has supplied some Administrative Office figures as indicating that the number of

There comes a time, in the criminal law as elsewhere, where the more remote past can not be set to rights in response to late-blooming legal doctrine, at least not without impairment of other vital interests. This is such a case, and because we believe it to be characteristic of those that will arise on collateral attack, we state our judgment to be that the retrospective operation of *Dorszynski* shall, in respect of sentences imposed prior to the issuance of our decision in *Coefield*, be restricted to direct appeals arising therefrom.[5] This differentiation of direct appeals from collateral attacks is one that has heretofore been recognized by this court as justifiable in appropriate circumstances. *See Pendergrast* v. *United States*, 416 F.2d 776, 782, *cert. denied*, 395 U.S. 926 (1969), and cases therein cited. We think the circumstances presented by this record warrant its utilization in the area addressed today by this court *en banc*.[6]

---

persons likely to benefit from full retroactivity for *Dorszynski* is not such as to create apprehensions about burdening the criminal justice system. The figures on their face are not impressively supportive of appellant's point, since they reveal very substantial numbers of defendants in the period from 1965 to 1972 receiving adult sentences despite their age eligibility for YCA. This presumably reflects the growing national concern about the participation by young people in serious crime.

[5] We use *Coefield* as the measuring date for the reason that *Coefield* made it the law of this circuit that the no-benefit finding must be explicit. *Dorszynski* adopted the same rule; and its invalidation of *Coefield's* additional requirement of the statement of reasons has no bearing on the issue immediately before us. Appellant is, of course, not helped by *Coefield* because his sentence occurred 12 years earlier, and there was no direct appeal.

[6] Coming down on the side of non-retroactivity in a 2255 case is the Tenth Circuit. Jackson v. United States, 510 F.2d 1335 (10th Cir. 1975). And, in another retroactivity context, see the apparently approving reference to *Jackson* in Bailey v. Holley, 530 F.2d 169, 173 (7th Cir. 1976). The Second Circuit, in its *en banc* pre-*Dorszynski* ruling like ours in *Coefield*, requiring both an explicit finding and a statement of reasons, expressly made that ruling non-retroactive. United States v. Kaylor, 491 F.2d 1133 (2nd Cir. 1973),

The District Court is, accordingly, affirmed.

It is so ordered.

---

vacated and remanded for reconsideration in the light of *Dorszynski*, *sub nomine* United States v. Hopkins, 418 U.S. 909 (1974). *See also* Owens v. United States, 383 F. Supp. 780 (M.D. Pa. 1974), *aff'd* without opinion, 515 F.2d 507 (3rd Cir. 1974), cert. denied, 423 U.S. 996 (1975), in which the District Court, in a carefully considered opinion, held *Dorszynski* non-retroactive in the context of a 2255 motion.

Our limitation of the retroactivity of *Dorszynski* is concededly at odds with holdings in other circuits. The latest of these appears to be McCray v. United States, 542 F.2d 1246 (4th Cir. 1976). That case involved a collateral challenge under § 2255, but the court, in a one-page *per curiam*, took no note of this fact, and limited its discussion to the assertion that it had "consistently remanded similar cases," citing two of its prior cases, one of which was a direct appeal in which the prosecutor had sought the remand, United States v. Bailey, 509 F.2d 881, 883 (1975), and the other, United States v. Flebotte, 503 F.2d 1057 (1974), was a 2255 which was remanded for resentencing in a 2-paragraph *per curiam* citing *Dorszynski* and a prior Fourth Circuit case, United States v. Ashby, 502 F.2d 1163 (table), from which, since there is no reported opinion, it is impossible to tell whether it involved direct appeal or 2255. The Eighth Circuit is also to the contrary. *See* Brager v. United States, 527 F.2d 895 (1975), which devotes most of its brief discussion to describing the findings which on remand will warrant dismissal of post-conviction applications. *See also* Belgrade v. United States, 503 F.2d 1054 (9th Cir. 1974), and Hoyt v. United States, 502 F.2d 562 (5th Cir. 1974), both of which are very brief *per curiam* dispositions.

MACKINNON, *Circuit Judge*, concurring specially, in which ROBB, *Circuit Judge* joins: I concur in the foregoing opinion except to the extent that it conflicts with the following. It is not my view that *Dorszynski* v. *United States*, 418 U.S. 424 (1974) requires an *explicit* finding of "no benefit" in all instances. In *Dorszynski*, the Chief Justice remarked that:

> An *explicit* finding that petitioner would not have benefited from treatment under the Act would have removed all doubt concerning whether the enlarged discretion Congress provided to sentencing courts was indeed exercised.

418 U.S. at 444 (emphasis added). What evoked this observation was that the sentencing proceeding in *Dorszynski* presented a record in which it was unclear whether

> the options of the Act were considered and rejected [or] whether . . . the court believed petitioner to be legally ineligible for treatment under the Act—which would be error—or whether, realizing he was eligible, nevertheless deliberately opted to sentence him as an adult.

418 U.S. at 444. It was in such circumstances that *Dorszynski* pointed out that an explicit finding of "no benefit" would have resolved that ambiguity in the record.

Elsewhere in the opinion it is stated:

> *Once it is made clear that the sentencing judge has considered the option of treatment under the Act and rejected it, however, no appellate review is warranted.*[1]

The question whether the finding of "no benefit" must be explicit or whether it may be implicit in

---

[1] In my view that is the factual situation here.

the record of a particular case is answered by the manifest desire of Congress to assure that treatment under the Act be considered by the court as one option whenever the youth offender is eligible for it. If the finding may be implied from the record, appellate courts must go on to determine what constitutes a sufficient showing of the requisite implication. To hold that a "no benefit" finding is implicit each time a sentence under the Act is not chosen would render § 5010(d) nugatory; to hold that something more is necessary to support the inference that must be found in the record would create an *ad hoc* rule. Appellate courts should not be subject to the burden of case-by-case examination of the record to make sure that the sentencing judge considered the treatment option made available by the Act.[2] *Literal compliance* with the Act can be satisfied by *any expression* that makes clear the sentencing judge considered the alternative of sentencing under the Act and decided that the youth offender would not derive benefit from treatment under the Act.

418 U.S. at 443-44 (emphasis added).

The Supreme Court thus states that literal compliance with the Act is satisfied if the trial court at the time of sentencing indicates by "any expression" that it: (1) considered the alternative of sentencing under the Act and (2) decided that the youth offender would not derive benefit from treatment under the Act. Therefore, when the sentencing judge in this case said:

> [O]bviously this is not a case for the Youth Corrections Act, both because of the nature of the offense and the nature of the prior records of these defendants. . . .

it is clear that he did consider "the alternative of sentencing under the Act." 418 U.S. at 444. It is also clear that when the sentencing judge stated:

> [Brackett] *needs* incarceration in a maximum security institution (emphasis added)

he was stating, as clearly as one could state without echoing the exact "no benefit" language of the statute, that the court concluded Brackett would not derive benefit from treatment under the Act.

It is thus my opinion that the sentence imposed satisfied the Youth Act requirements and was not in conflict with the requirements of *Dorszynski*. There was nothing ambiguous in the sentencing by Judge Holtzoff, like the ambiguity in *Dorszynski*, that created any doubt that "the sentencing judge considered the treatment option made available by the Act" and that such "options of the Act were considered and rejected." Nor is there anything in Brackett's sentencing that creates any doubt that the sentencing judge had considered whether the defendant was "legally [eligible] for treatment under the Act."

The majority opinion does not disagree with this characterization of the trial judge's sentencing. The majority grants that (1) the trial judge made "comments" and "extensive references", and (2) that those statements made clear that "appellant would not respond to YCA treatment." (Maj. op. at 5 & n. 2). *Dorszynski* requires no more.

This is not to say that an incantation of the "no benefit" finding would not more clearly have satisfied the statute. However, to my mind the judge was telling Brackett that he would *not* derive benefit from treatment

---

[2] It is clear here that the sentencing judge did consider the sentencing options.

under the Act when he told him he "*need*[*ed*] *incarceration* in a maximum security institution." The sentencing proceedings thus did not involve any indication that the probation officer or court were uncertain as to the eligibility of the defendant for a Youth Act sentence, such as was present in *Dorszynski*. In my view the sentencing proceeding satisfies all the requirements that *Dorszynski* outlines for a legal sentence, and thus it is not necessary for us to consider whether *Dorszynski* is retroactive.

As I read *Dorszynski* an implicit finding of "no benefit" satisfies the statute unless the basis for reaching the implication is ambiguous. There is no latent ambiguity in the instant sentencing proceeding.

BAZELON, *Chief Judge, dissenting,* in which ROBINSON, *Circuit Judge* joins:

Having decided that *Dorszynski* will not be applied retroactively to collateral attacks on sentences and that the pre-*Coefield* requirement of either an express or implied finding of "no benefit" applies to this case—views which I share—the majority affirms Brackett's sentence because it concludes that the sentencing judge here made the necessary implied finding. On this record, I find neither an express nor implied finding of "no benefit," and thus conclude that under either a pre- or post-*Dorszynski* standard the sentencing judge failed to give the required degree of attention to the possibility of a Youth Corrections Act sentence.

Before pronouncing sentence on Brackett and his codefendant, the district judge asked counsel for their comments. Brackett's attorney stressed his client's youth and urged YCA sentencing; his codefendant's attorney argued that his client's youth, low intelligence, and lesser role in the crime supported leniency and YCA sentencing. The court then expressed its views:

> The fact that these defendants are young is not a mitigating circumstance so far as their crime is concerned. They are really murderers. They were allowed to plead guilty to manslaughter, but their acts could have been held by the jury to constitute murder. They were prisoners in the National Training School for Boys, having been committed under the Federal Juvenile Delinquency Act for stealing automobiles. Each of them has a bad record before this present commitment. They were in a dormitory with 80 other prisoners. There was only one guard during the night. He sat inside, immediately inside the dormitory, at a desk. The door of the dormitory was locked. . . .

These two defendants, in conjunction with the third defendant, Jankowski, plotted to overpower the officer, get the keys from him and make an escape during the night. Brackett, although he is the youngest of the three, was the ring leader and he is apparently the most vicious of the three.

By a prearranged signal they got out of their beds and walked to the desk and Brackett grabbed a big heavy brass lamp and began to beat the guard over the head with that lamp and, in addition to that, used a big broom. McCracken, according to the evidence, participated in the beating by hitting the guard with his fist. The guard was screaming and pleading for help but Brackett, particularly, did not let up the beating.

The guard was eventually found on the floor in a pool of blood. He was in a coma for a week and three weeks later he died of this attack.

Now, obviously this is not a case for the Youth Corrections Act, both because of the nature of the offense and the nature of the prior records of these defendants. *The Court is more interested in the fate that befell the guard than it is in the future of these two boys.*

Now, if they have a spark of humanity—and every human being has; some have a greater spark and some a lesser, but everyone has—they will lie awake many a night in a feeling of remorse for what they have done, and if they have any spark of humanity they will spend many an hour on their knees praying to God and imploring God to forgive them.

Now, Brackett has shown vicious tendencies. In addition to plotting the escape plan involved in this case, after he pleaded guilty he tried to escape from

the Marshal's van. He needs incarceration in a maximum security institution. (Emphasis added.)

The court then gave Brackett the maximum adult sentence of five to fifteen years, with recommended commitment in a maximum security facility. Appellant was fifteen years old at the time.

I do not find in the sentencing judge's statement any conclusion, express or implied, that appellant would fail to benefit from Youth Corrections Act sentencing. The judge obviously was aware of this option, but his comments demonstrate that he ruled it out without regard to Brackett's rehabilitative potential under Youth Act treatment. He focused instead on the viciousness of the crime, frankly admitting that he was more concerned with the violence done to the victim than with the reformation of the defendants.[1]

Under either a pre- or post-*Dorszynski* standard, a judge must do more than indicate awareness that the Youth Corrections Act option exists. He must express his decision "that the youth offender would not derive benefit from treatment under the Act." *Dorszynski*, *supra*, at 444. Section 5010(d) of the Act requires that a judge make this finding before resorting to an adult

---

[1] The Youth Corrections Act does not exclude categories of youthful offenders from its coverage, neither those with long records nor perpetrators of vicious offenses nor murderers. These factors may be relevant to the determination of whether a youth will benefit from Youth Corrections Act treatment—either pro or con—but they cannot be relied on as rigid indicators. As the Second Circuit has stated, the sentencing judge should make "a careful appraisal of the variable components relevant to the sentence upon an individual basis" rather than employing "a fixed and mechanical approach in imposing sentence." United States v. Schwarz, 500 F.2d 1350, 1352, (1974) (district judge's statements required vacation of adult sentence because they were susceptible to the interpretation that only ghetto youths are eligible for YCA treatment). *See also* Dorszynski v. United States, 418 U.S. at 450 (Marshall, J., concurring).

sentence because Congress believed that the Youth Corrections Act program would be likely to "provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket, to rehabilitate them and restore normal behavior patterns." *Dorszynski*, *supra*, at 433.

The majority's effort to recast the judge's discourse in our pre-*Coefield* doctrinal mold falls considerably wide of the mark. The most the majority can say is that some of his remarks are "supportive of [a no-benefit] implication" and that others, which concededly "argue for a different interpretation," assertedly are not "inconsistent with a non-benefit conclusion." Majority op. at 6 n.2. Even assuming arguendo the validity of this analysis, however, it hardly bears out the thesis that the sentencing judge made an implied no-benefit finding within Section 5010(d) as construed in *Waters* and *Ward*. It does not suffice to merely wring some intimation of no-benefit from what the sentencing judge said; at the very least, the question in terms of those decisions is whether the implication is plain and unambiguous. In each of those cases, particular observations viewed in isolation indicated that no benefit from Youth Act treatment was expectable, but there were other observations casting doubt on that reading. *United States* v. *Waters*, 437 F.2d 722, 725-726 (D.C. Cir. 1970); *United States* v. *Ward*, 454 F.2d 992, 993-994, 995 (D.C. Cir. 1971). *See also Dorszynski*, *supra*, at 443-444. In concluding that Section 5010(d) did not tolerate that sort of fuzziness, we held in effect that imprecise expressions could do service as implied no-benefit findings only when the message was clear.

Although the Supreme Court has held that a judge need not give reasons for his finding of "no benefit," [2]

[2] Dorszynski v. United States, 418 U.S. 424, 441-42 (1974).

no one has yet suggested that a judge may impose an adult sentence for reasons other than the defendant's incapacity to be helped by Youth Act treatment. Because the sentencing judge's comments unmistakably show reliance on such impermissible reasons, I would reverse and remand to the District Court for determination of whether Brackett might have benefited from Youth Act treatment at the time of his original sentencing.[3]

[3] If Brackett were found suitable for YCA treatment, he should be released from federal supervision stemming from this conviction because the YCA requires that a youth sentenced thereunder be discharged no later than "the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction." 18 U.S.C. § 5017(d). *See* majority op. at 6-7. *Compare Dorszynski*, 418 U.S. at 429 n.6.

Order of the District Court denying petitioner's Section 2255 motion, August 6, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-742

(Criminal No. 953-60)

WALTER STEVE BRACKETT,
Petitioner

vs

UNITED STATES OF AMERICA,
Respondent

ORDER

Upon consideration of petitioner's Motion to Set Aside and Vacate Judgment of Conviction and respondent's Opposition thereto, it is by the Court this 6th day of August 1974,

ORDERED that petitioner's Motion should be and hereby is denied, and it is

FURTHER ORDERED that this case be and hereby is dismissed.

/s/ June L. Green
JUNE L. GREEN
U. S. District Judge

Judgment of the panel of the Court of Appeals, December 10, 1975

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

Civil 74-742 (2255)

Cr 953-60

No. 75-1495

UNITED STATES OF AMERICA

v.

WALTER S. BRACKETT,
Appellant

Appeal from the United States District Court
for the District of Columbia

Before: MCGOWAN, TAMM and ROBB, *Circuit Judges*

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

ON CONSIDERATION OF THE FOREGOING, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

The duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of Federal Rule of Appellate Procedure 35(a).

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Statutes and regulations involved

1. 28 U.S.C. § 2255 (1970) provides that:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

2. The Federal Youth Corrections Act, 18 U.S.C. §§ 5006, 5010 and 5017 (1970), provide in pertinent part:

§ 5006. Definitions

As used in this chapter—

* * * *

(e) "Youth offender" means a person under the age of twenty-two years at the time of conviction;

* * * *

§ 5010. Sentence

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings.

3. Sections 11-906, 11-907 and 11-914 of the District of Columbia Juvenile Court Act (1961), provide in pertinent part:

§ 11-906. Application of subchapter-Definitions.

(a) This subchapter shall apply to any person under the age of 18 years—

(1) Who has violated any law; or who has violated any ordinance or regulation of the District of Columbia . . . .

* * * *

(b) When used in this subchapter—

* * * *

(3) The word "child" means a person under the age of 18 years. . . .

* * * *

§ 11-907. Jurisdiction—Original and exclusive.

1. *Children.*—Except as herein otherwise provided, the court shall have original and exclusive jurisdiction of all cases and in proceedings:

(a) Concerning any child coming within the terms and provisions of this subchapter.

(b) Concerning any person under 21 years of age charged with having violated any law, or violated any ordinance or regulation of the District of Columbia, prior to having become 18 years of age, subject to appropriate statutes of limitation.

* * * *

When jurisdiction shall have been obtained by the court in the case of any child, such child shall continue under the jurisdiction of the court until he becomes 21 years of age unless discharged prior thereto: *Provided, however,* That nothing herein contained shall affect the jurisdiction of other courts over offenses committed by such child after he reaches the age of 18.

* * * *

§ 11-914. Waiver of jurisdiction in case of felony—Transfer of case.

If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would

have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases.

Order of the Juvenile Court waiving jurisdiction, October 19, 1960

By authority vested in me under Section 13 of the Juvenile Court Act of the District of Columbia of June 1, 1938, 52 Stat. 599, ch. 309, as amended, and after full investigation, I do hereby waive jurisdiction over the following offense, which if committed by an adult would be punishable by death or life imprisonment, charged against WALTER STEVE BRACKETT, born September 14, 1945, of National Training School for Boys in the District of Columbia,

> Murder: Date of offense—on or about September 11, 1960, in the vicinity of National Training School for Boys, Columbia Hall; Complainant, William Latimer (deceased)

and I do hereby order said child for trial for such offense under the regular procedure of the D.C. District Court for the District of Columbia.

Dated this 19th day of October, 1960, at Washington, D.C.

/s/ Orman W. Ketcham
Judge

A true copy.
Attest:

/s/ Edith W. Dowden
Acting Clerk
Juvenile Court, D.C.

Trial transcript. January 31, 1961

[201] AFTERNOON SESSION

1:45 p.m.

(The following proceedings were had out of the presence of the jury.)

THE COURT: We will proceed with the case on trial.

Will counsel come to the bench, please.

(At the bench:)

THE COURT: Mr. Karr, I have kept the jury in the jury room and I have also asked you gentlemen to come to the bench so that there would be no possibility of anyone overhearing this bench conference.

You know, I am a bit concerned as to whether you gave good advice to your client. In one sense I do not share any responsibility in the matter because you were retained and selected by the defendant, you were not appointed by the Court. If I had appointed you I would be a little more concerned.

Your client is on trial for his life. Have you considered that? He has a possibility of pleading guilty to manslaughter.

The boy Jamison's testimony was one of the most gruesome bits of testimony I have heard in all my years on the bench.

It is all very well for you to claim no causal connection between the beating and the death. You would have [202] a lot of difficulty in disproving Dr. Rosenberg's testimony.

Are you going to have any medical testimony on that point?

MR. KARR: Yes, indeed.

THE COURT: Have you had the defendant examined?

MR. SMITHSON: Yes, Your Honor. He refused to talk to Dr. Cavanagh. He refused to even tell Dr. Cavanagh his name.

THE COURT: I would let you call Dr. Cavanagh.

MR. SMITHSON: I can do even better, Your Honor. He had a psychological test given out there by Dr. Twain, Chief Psychologist, and Dr. Jacobs is a psychiatrist.

THE COURT: But I also will let you call Dr. Cavanagh and let him testify the man refused.

MR. SMITHSON: I intend to.

THE COURT: Because that would show he is not acting in good faith.

MR. KARR: Your Honor—Excuse me, I withdraw this comment at this point.

THE COURT: I am going to admit that evidence, that Dr. Cavanagh tried to see him and he refused to talk to him, because that throws considerable light on the good faith of the insanity defense.

As I say, you have the responsibility for such advice as is given to a client, of course.

[203] How many years have you been practicing?

MR. KARR: Two and a half.

THE COURT: You see, I would not appoint a man with two and a half years' experience to try a murder in the first degree case. I never have. I have always appointed older experienced lawyers because the younger man may be just as good a trial lawyer but he has not got mature judgment.

You have appeared before me in other matters and I have always looked upon you as a promising young lawyer.

MR. KARR: Thank you.

THE COURT: And I still do. But I think you take an awful burden on yourself when you advise your client to contest this case when he has an opportunity to plead guilty to manslaughter.

MR. KARR: I can't tell you, Your Honor, how this has weighed upon my mind. I told you yesterday here at the bench, when you asked me to make a decision, that this is probably one of the most grievious decisions I have ever made in my life, vis-a-vis giving this man advice regarding what I think he should do.

THE COURT: What does he want to do? Or, does he rely solely on your advice? If you prefer not to answer that, don't answer it because, after all, I do not want to pry into the confidential relation between a lawyer and client.

MR. KARR: As Your Honor knows, I have never been [204] less than forthright with Your Honor in all of our dealings in the past and certainly during the course of the trial.

THE COURT: Yes, there is no question about that.

MR. KARR: I don't certainly hesitate to answer your question on that basis. I have informed him of what I think the quality of his defense is. I have informed him fully that he has a perfect right to plead guilty to manslaughter, as did the other two boys, if he so desired. I told him what the penalty was, and he asked me my evaluation of the strength of his defense.

Now, Your Honor, if I had gone out and had had the money in this case to go out and hire a psychiatrist and it was exclusively on the basis of this psychiatrist's testimony that I was grounding my insanity defense, it would be one thing. But, Your Honor, to me, this was a court-appointed entirely impartial psychiatrist, and I have talked—

THE COURT: That psychiatrist's report is not worth the paper it is written on, absolutely not. As a matter of fact, I am surprised that that psychiatrist would render such a report. He does not say what the mental disease of the defendant is. He says it is caused by his psychological make-up and, therefore, the product of mental disease. It does not state what mental disease

he had. I must say that I was amazed at that report. That report can be torn to shreds, Mr. Karr.

[205] What Mr. Smithson said just now is new to me. The fact that the Government sent a psychiatrist to interview him and the defendant refused to talk to the psychiatrist is evidence of his bad faith and certainly is admissible, and I imagine Mr. Smithson will make very strong argument on that issue.

Besides which, if he is insane, he is in for a long term in a lunatic asylum.

MR. KARR: To be sure.

THE COURT: Not just a mental hospital where civilian patients are sent and have the privileges of the grounds and all that. He would be in a locked criminal ward mingling with murderers, rapists, raving maniacs, where he might be assaulted by mad men. Actually, I think he would be happier in the penitentiary.

Now, on the other hand, if he is found guilty of murder in the second degree he would get a much longer sentence, of course, than the maximum of manslaughter, and there is a possibility of his being found guilty of murder in the first degree. I never thought so until I heard Adrian Jamison's testimony. It horrified me.

MR. KARR: I am not certainly happy with the idea, as I said in my opening statement. I am not very happy with the idea that this guard was assaulted and ultimately died, believe me, Your Honor.

[206] THE COURT: I understand. As I say, you are not Court appointed so the Court does not share any responsibility. The defendant will never be in a position to say, "You have appointed a lawyer with insufficient experience for a murder case." He would say, "I have selected my own lawyer." He would have to say that. Or, we would say, "You selected your own lawyer."

For a lawyer with your experience you are doing very well. You are doing much better than the average

lawyer who has had two and a half years' experience. But, after all, this is a murder case, this is a murder in the first degree case.

Wesley McDonald is a very experienced lawyer. He is an experienced trial lawyer, tried every kind of case for many years. Jankowski is the least guilty of the three and, even so, Wesley McDonald advised his client to take advantage of the opportunity to plead guilty to manslaughter.

MR. KARR: I know this, Your Honor.

THE COURT: I am going to drop the matter at this point, but I do say if there is a verdict of guilty of murder in the first degree you will regret it very much. After all, you are gambling with another man's life.

MR. KARR: I am fully aware of this and, believe me, this doesn't lie lightly upon my mind, as I indicated to you yesterday. Frankly—

[207] THE COURT: The least that you perhaps might have done is to say, "I will give you no advice, you make your own decision."

MR. KARR: But a 15-year-old boy, when he asks me for advice—

THE COURT: He is not 15, is he?

MR. KARR: Yes, Your Honor.

MR. SMITHSON: He was 14 at the time.

MR. KARR: Fourteen at the time that this happened. If my son, Your Honor, were charged with this offense, I wouldn't let him make this decision.

THE COURT: Perhaps so. I did not realize he was as young—he looks much older.

MR. SMITHSON: He was the ring leader, Your Honor, is the Government's contention, and I think counsel ought to bear this in mind, too, he has been in trouble in two other institutions, running away and other kinds of fight.

MR. KARR: I understand this and, believe me, I don't underestimate the experience that Mr. Smithson has over the experience that I have in this matter.

THE COURT: I personally think what is going to happen in this case, if I was to prognosticate, that there would be a verdict of guilty of murder in the second degree. However, do not discount a possibility of murder in the first degree.

[208] Let me tell you an experience I had, I guess it was a year and a half ago or two years ago. I forget which assistant it was. I had a murder case, an indictment of murder in the first degree. I thought the evidence of premeditation was very skimpy and very doubtful, much weaker than in this case, and yet just enough to let it go to the jury. But I thought the jury should find the defendant guilty of murder in the second degree, not murder in the first degree, and in my instructions to the jury I talked a lot about murder in the second degree and very little about murder in the first degree. To my discomfort and distress the jury came in and found him guilty of murder in the first degree.

Now, I want to tell you this, I found a way of setting that verdict aside, which I did. I won't find a way here, probably, because Jamison's testimony would convict anybody. Of course, you may contradict it, but if the jury believes Jamison's testimony you are in a bad position.

So the man was retried and he was found guilty of murder in the second degree.

But there is such a thing as runaway trial juries. In the Tatum case, the famous Tatum case, I tried it, I never expected a verdict of guilty with capital punishment. Mr. McLaughlin was counsel for the Government—no, it was not Mr. McLaughlin.

MR. SMITHSON: Mr. Conliff, I believe it was.

[209] THE COURT: Anyway, George Hayes was defense counsel. It was a very brutal rape of a seven-year-old girl. The girl was almost torn in half and was in the hospital for some weeks. There wasn't any doubt about

the man's guilt. Everybody was surprised when the jury came in and said guilty with the death penalty.

You know, in spite of what you read in the Washington Post, Washington juries do not hesitate to bring in a verdict that carries capital punishment. I base this on my observation, the Washington Post to the contrary notwithstanding. We have no trouble getting convictions in murder in the first degree cases.

I know statements have been made to that effect, but that is not true. The fact that the Judicial Conference voted against capital punishment a year ago, that was an audience composed largely of opponents to it and the other side was not well represented. It was not a true vote. If there was a secret ballot by mail of the entire Bar of the District of Columbia capital punishment would be approved overwhelmingly, and more so than a year ago because we have got more homicides.

So, there you are. We will go on with the trial, but I am very much concerned about the advice you have given to your client.

MR. KARR: So am I, so am I.

[210] THE COURT: Just to say so am I does not give me any comfort.

MR. KARR: Your Honor, it doesn't give me any comfort, either. I have to follow the dictates of my conscience.

THE COURT: I think you are immature, Mr. Karr.

MR. KARR: That is entirely possibly.

THE COURT: Why don't you associate an older lawyer with you?

MR. KARR: I had three older lawyers with me at the beginning.

THE COURT: Why don't you talk to Wesley McDonald? I think Wesley McDonald would advise with you without expecting any remuneration.

MR. KARR: Of course. There is no remuneration to give in this case.

THE COURT: Exactly. I am sure Mr. McDonald would unselfishly discuss the matter with you.

MR. KARR: I am certain of this.

THE COURT: You talk to him. However, I am not going to bring the subject up again. We will proceed.

MR. KARR: You Honor, one more thing. While we are at the bench perhaps we could dispose of this. The Defendant Jankowski had under subpoena certain witnesses. These witnesses are James Jopp, Cheesman, and Olson. I understand from the Marshal downstairs that inasmuch as * * *

* * * *

[224] (The last answer was read by the reporter.)

BY MR. KARR:

Q Did he look pretty wild when he was swinging that lamp?

A Yes, sir.

Q Did you get a look at his eyes?

MR. SMITHSON: I object, Your Honor. I think we are going into another issue.

THE COURT: I think this is part of the res gestae. It is within the scope of direct examination.

MR. SMITHSON: I think it's going to a more affirmative position.

THE COURT: Yes, it does, but on the other hand, it is within the scope of the direct examination as to what happened at the time.

MR. SMITHSON: All right.

THE COURT: You may proceed.

MR. KARR: Thank you, Your Honor.

BY MR. KARR:

Q Did he look pretty wild?

A Yes, sir.

Q Did you get a look at his eyes?

A Yes, sir.

Q How did they look?

A I guess you'd call them looking wild. They were [225] real wide.

Q You are talking about Brackett now, aren't you?

A Yes, sir.

Q Did you hear what Mr. Latimer said to Brackett just before Brackett hit him?

A No, sir.

Q You did testify that you heard them saying something, but you couldn't hear it, isn't that correct?

A Yes, sir.

MR. KARR: That is all, Your Honor. Thank you.

REDIRECT EXAMINATION

BY MR. SMITHSON:

Q You say, sir, you were asked on cross-examination where Campbell was sleeping and you responded where he was sleeping or where he was supposed to sleep. Did you see him in a different bed than his normal bed that night?

A Yes, sir.

Q And who was in the bed he normally occupied that night?

A I can't recall, but he was sleeping in the wrong bed.

Q He was in the wrong bed. Did you see him go to the bathroom earlier and come back to his bed?

A Yes, sir.

Q Was his bed occupied at that time?

* * * *

[235] A Yes, sir.

Q These stairs were located, as you look at the desk, these stairs were located to the left of the desk, were they not?

A Yes, sir.

Q Now, a bunch of boys rushed to these stairs after Brackett and McCracken had gone down, didn't they?
A Yes, sir.
Q How many boys would you say?
A I don't know.
Q Were you one of those boys?
A No, sir.
Q Was Jamison one of those boys?
A I don't recall.
Q You were sleeping when this whole thing began, weren't you?
A Yes, sir.
Q And the noise woke you up, didn't it?
A Yes, sir.
Q And when you woke up did you get a clear look at Brackett?
A Yes, sir.
Q What did he look like to you?
A His eyes looked like he was crazy or something.
THE COURT: Like what?

* * * *

[273] Q What did he look like when he was hitting the man over the head with the lamp?
A I think it was as he was going down, something like that.
THE COURT: What was your answer?
THE WITNESS: I think he was going down. He was hollering for help then.

BY MR. KARR:

Q What did Brackett look like when he was hitting the man over the head with the lamp?
A Looked like he was going crazy.
Q He did?
THE COURT: Like what?
THE WITNESS: Like he was going out of his mind.
MR. KARR: That's all, Your Honor, thank you.

REDIRECT EXAMINATION

BY MR. SMITHSON:

Q Tell me, sir, had you ever been asked a question about how he looked before, at the time he was doing this beating? That is the defendant Brackett.
A No, sir.
Q You have talked to no one about that?
A No, sir.
Q Did you talk to Mr. Goldberg?
A No, sir.

* * * *

Transcript of Sentencing, March 10, 1961

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 953-60

UNITED STATES

vs

WALTER S. BRACKETT, RICHARD L. MCCRACKEN,
Defendants.

Washington, D. C.
March 10, 1961

The above cause came on before the HONORABLE ALEXANDER HOLTZOFF, United States District Judge, for sentencing.

APPEARANCES:

ON BEHALF OF THE GOVERNMENT:

VICTOR CAPUTY, ESQ.
Assistant U. S. Attorney

ON BEHALF OF THE DEFENDANTS:

JOHN W. KARR, ESQ.
MAX N. GOLDBERG, ESQ.
FOSTER WOOD, ESQ.

THE DEPUTY CLERK: Walter S. Brackett and Richard McCracken.

THE COURT: The Court will hear counsel for the defendant Brackett.

MR. KARR: Thank you, your Honor. May it please the Court, the only words I have to offer to the Court at this time would be to ask the Court to consider, as I am sure the Court has, the extreme youth of the defendant Brackett. He is currently 15 years of age, and was at the time this very [2] unfortunate crime was committed, he was 14 years of age. I would, therefore, ask your Honor to consider in terms of what might possibly be done with this boy to salvage him both for himself and society, to consider sentencing him under the Youth Corrections Act. This would be all that I would offer, your Honor.

THE COURT: Brackett, is there anything you would like to say before sentence is imposed?

DEFENDANT BRACKETT: No, sir.

THE COURT: The Court will hear counsel for the defendant McCracken.

MR. GOLDBERG: May it please the Court, I respectfully request in this action, this sentencing, a blend of justice and leniency for Richard L. McCracken. He also is a youth. I think the facts will bear out that he did not take a prime part in the case as it finally ended up. He did not take a prime part in the assault of the individual whose life was lost. His age, he is a minor; his mentality, I think that the facts in the psychological testing which he underwent and I think the results of the psychiatric examinations which he underwent will bear out that this boy is of a low average mentality and, as a matter of fact, is a borderline case. I respectfully represent to this Court and respectfully request that this boy's life is blemished by this action and I ask the Court to refer this case to the United States Justice Department—I ask that a recommendation be made to the United [3] States Justice Department, Bureau of Prisons, that the boy be placed under the Youth Correction Act.

THE COURT: The Court does not make a recommendation. You mean that the Court commit him under the Youth Correction Act.

MR. GOLDBERG: Commit him under the Youth Correction Act and that he not be confined in a penitentiary for this crime.

THE COURT: The fact that these defendants are young is not a mitigating circumstance so far as their crime is concerned. They are really murderers. They were allowed to plead guilty to manslaughter, but their acts could have been held by the jury to constitute murder. They were prisoners in the National Training School for Boys, having been committed under the Federal Juvenile Delinquency Act for stealing automobiles. Each of them has a bad record before this present commitment. They were in a dormitory with 80 other prisoners. There was only one guard during the night. He sat inside, immediately inside the dormitory, at a desk. The door of the dormitory was locked. It does seem to me that a guard ought not to be in a locked room with 80 people when he is in no position to call for help. There was not even a push button, there was only a wall telephone.

These two defendants, in conjunction with the third defendant, Jankowski, plotted to overpower the officer, get the keys from him and make an escape during the night. Brackett, [4] though he is the youngest of the three, was the ring leader and he is apparently the most vicious of the three.

By a prearranged signal they got out of their beds and walked to the desk and Brackett grabbed a big heavy brass lamp and began to beat the guard over the head with that lamp and, in addition to that, used a big broom. McCracken, according to the evidence, participated in the beating by hitting the guard with his fist. The guard was screaming and pleading for help but Brackett, particularly, did not let up the beating.

The guard was eventually found on the floor in a pool of blood. He was in a coma for a week and three weeks later he died of this attack.

Now, obviously this is not a case for the Youth Corrections Act, both because of the nature of the offense and the nature of the prior records of these defendants The Court is more interested in the fate that befell the guard than it is in the future of these two boys.

Now, if they have a spark of humanity—and every human being has; some have a greater spark and some a lesser, but everyone has—they will lie awake many a night in a feeling of remorse for what they have done, and if they have any spark of humanity they will spend many an hour on their knees praying to God and imploring God to forgive them.

Now, Brackett has shown vicious tendencies. In addition to plotting the escape plan involved in this case, after he [5] pleaded guilty he tried to escape from the Marshal's van. He needs incarceration in a maximum security institution.

I have already inquired of Brackett whether he has anything to say. McCracken, have you anything to say before sentence is pronounced?

DEFENDANT McCRACKEN: No, sir.

THE COURT: Walter S. Brackett, it is the judgment of this Court that you be imprisoned in an institution to be designated by the Attorney General of the United States for a term of not less than five years and not more than fifteen years. The Court recommends commitment to a Federal institution of the maximum security type.

Richard L. McCracken, it is the judgment of this Court that you be imprisoned in an institution to be designated by the Attorney General of the United States for a term of not less than five years and not more than fifteen years. The Court will make no recommendation as to McCracken because Brackett is the more vicious character.

MR. CAPUTY: If your Honor please, the Government moves to dismiss the remaining counts as to both defendants.

THE COURT: Leave to dismiss is granted.

REPORTER'S CERTIFICATE

I, Gerald Nevitt, certify the foregoing 5 pages constitute the official transcript of the stated proceedings.

/s/ Gerald Nevitt

Order of the Court of Appeals respecting petitioner's request for writ of mandamus, May 13, 1974

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

No. 74-8027

74-742

WALTER STEVE BRACKETT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Before: Bastian, Senior Circuit Judge, and Robb, Circuit Judge

ORDER

In consideration of petitioner's motion for leave to file a petition for writ of mandamus in *forma pauperis*, and of petitioner's proffer of photocopies of receipts for certified mail indicating his attempts to file a motion to set aside and vacate judgment of conviction in the District Court, it is

ORDERED by the Court that petitioner's aforesaid motion and lodged petition for writ of mandamus are remanded to the District Court for consideration in the first instance.

The Clerk is directed to transmit a copy of petitioner's pleadings with his other papers to the District Court with a copy of this order.

Per Curiam

Hugh E. Kline
Clerk
United States Court of Appeals
for the District of Columbia Circuit

By: /s/ [Illegible]
Deputy Clerk

Motion to Set Aside and Vacate Judgment of Conviction, May 16, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-742

WALTER STEVE BRACKETT
Box PMB No. 0-4414-134
Atlanta, Georgia
Plaintiff

v.

UNITED STATES OF AMERICA

MOTION TO SET ASIDE AND VACATE JUDGMENT OF CONVICTION

Now comes the plaintiff Walter Steve Brackett and pursuant to Section 2255, Title 18, moves this Court for an order vacating and setting aside judgment of conviction on March 10, 1961 for the offense of manslaughter.

Plaintiff is now unlawfully confined of his liberty in the United States Penitentiary at Atlanta, Georgia.

Plaintiff says unto the court that his constitutional rights were violated during the trial. Not only did the court lack jurisdiction but the other violations of constitutional rights robbed the court of jurisdiction and therefore it could not proceed to judgment. Plaintiff says among others he now sets forth some of the violations.

1. Plaintiff was only fifteen years of age at the time of the trial and only fourteen years at the time of the alleged offense. Due to the age of the plaintiff there was imposed upon the court the duty and responsibility of indulging every constitutional right in his behalf.

2. The waiver as entered in the records of the Juvenile Court of the District of Columbia did not conform to due process law. See *Kemplen* v. *State of Maryland*, 428 F (2) 169 CCA 4 (1970). This case made fully retroactive.

3. There was ineffective assistance of counsel at plaintiff's trial in that appointed counsel took no interest in the case and failed to advise him of his rights as to appellate procedure. See *United States* v. *DeCoster*, USAppDC 72-1283 decided Oct. 4, 1973. This case of course is fully retroactive.

4. At the conclusion of plaintiff's trial the trial judge failed to sentence the plaintiff under the Youth Corrections Act and in failing to do so did not make an affirmative finding with specific reasons for failure so to do as required by a long line of opinions from the Court of Appeals the latest of which is *United States* v. *Toy*, 482 Fed (2) 741 decided July 13, 1973. Of course this case like the others is fully retroactive.

5. At the time of sentencing the trial judge took into consideration past convictions of plaintiff (although he was a juvenile) when he was not represented by counsel. Of course *United States* v. *Tucker* prevents this, 404 United States 443 (1972). This principle of law was made fully retroactive by the latest Supreme Court ruling in *Berry* v. *City of Cincinnati* decided by the Supreme Court of the United States on November 5, 1972.

6. Statements were elicited from the plaintiff while said plaintiff was subject to the jurisdiction of the juvenile court were used at the trial and said statements were inadmissible. See *Kent* v. *United States*, 383 United States 1045.

7. The Court failed to accord plaintiff due process in connection with his claim of insanity.

8. Section 2255, Title 18 is unconstitutional and in this complaint plaintiff's challenges the constitutionality of this form of post conviction relief—or in any event he challenges the manner in which the courts administer Section 2255.

It will be seen that constitutional questions raised by plaintiff are serious and substantial and it will be readily apparent that with a full plenary evidentiary hearing to which plaintiff is entitled—with plaintiff present—he can support his allegations. In fact, plaintiff says that the government cannot deny or contradict his contentions.

Plaintiff recognizes that it is well understood—although not admitted—that trial courts look with disfavor on post conviction proceedings and try hard to adhere to the concept of finality. It will be conceded that many such proceedings are obviously without merit and the courts have no choice but to deal with them summarily. However, it is another story when it is alleged that the constitutional rights of an accused—as in plaintiff's case—were violated at the trial and the violations are set out one by one then the court must grant an evidentiary hearing. *Kaufman* v. *United States*, 394 United States 217, requires this. In fact, the United States Court of Appeals for the District of Columbia recognized this in *United States* v. *Haywood*, 150 USAppDC 247 (1972) set forth the standards for a hearing. Of concern is the concurring opinion of Judge Wilkey:

> "I concur in Judge Fahy's carefully reasoned opinion and the action the court takes here, not because I am convinced of the wisdom of it but because I feel it is compelled by the Supreme Court's 5-3 decision in *Kaufman* v. *United States* 217."

Plaintiff says it is well stated in *Green* v. *United States*, 158 Fed. Supl. 804:

> "His detailed allegations must be such that if the details were proved and not contradicted a court would be justified in setting aside the sentences."

In fact, the late Judge Prettyman in *Mitchell* v. *United States*, 104 USAppDC 57 said virtually the same thing.

Now as to the merits.

1

Plaintiff was only fifteen years of age at the time of trial and only fourteen years of age at the time of the alleged offense. It will be conceded that due to the age of plaintiff there was imposed upon the court the duty and responsibility of indulging every presumption of the waiver of any constitutional right. Although the trial court was well aware of the age of plaintiff both at the time of trial and at the time of the alleged offense the plaintiff was treated at all times and under all circumstances as an adult. As to the waiver of constitutional rights, see *Patton* v. *United States*, 281 United States 276 and the duty of the court as to waiver:

> "And the duty of the trial court in that regard is not to be discharged as a mere matter of rote but with a sound and advised discretion with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof and with a caution increasing in degree as the offense dealt with increases in gravity."

2

The waiver from Juvenile Court was unconstitutional in that it did not conform to due process of law. There was no hearing in Juvenile Court and plaintiff was without counsel. See *Kent* v. *United States*, 383 U.S. at 541. What was said in *Kemplen* v. *State of Maryland* is particularly appropriate to plaintiff.

> "If the court finds that waiver was inappropriate Kemplen's conviction must be vacated. He may not be tried again because he has served his full adult sentence and is over 21".

It goes without saying that in the matter of waiver plaintiff was entitled to a hearing and to be represented by counsel. This, of course, is a vital constitutional point and would in itself void the conviction and sentence.

3

There was ineffective assistance of counsel within the confines of the very recent opinion of this court in *United States* v. *DeCoster*, 72-1283 decided Oct. 4, 1973. Counsel originally appointed did not even talk with plaintiff. New counsel was appointed and without inquiring of plaintiff as to availability of witnesses and matters of defense through misrepresentation and subterfuge induced plaintiff to enter a plea of guilty to manslaughter. The plea was not voluntary. Of course it could hardly be expected that a lad of 14 could understand the various ramifications of the consequences of a plea of guilty. When counsel informed plaintiff that he had made a deal with the prosecutor and what the prosecutor offered was the best for plaintiff, the plaintiff relied on him. At that time plaintiff believed that said counsel was acting in plaintiff's best interests and plaintiff did not dispute counsel's promises. In truth and in fact counsel was trying to take the easy way out and make a disposition of the case.

4

The trial judge was in error in failing to sentence plaintiff under the Youth Corrections Act and in failing

to do so failed to make an affirmative finding for failing to do so. It is necessary that there must be an affirmative finding but the specific reasons must be set forth. This was plainly set forth in perhaps the most recent case from the Court of Appeals *United States* v. *Toy*, 482 F (2) 741 (1973). See also *United States* v. *Coefield*, 476 F (2) 1157 and *United States* v. *Reed and Hoston*, 476 Fed (2) 1150. In order to show just what is required by the Court of Appeals there is annexed hereto as Exhibit A. This involves correspondence between Judge Gesell of this court and the corrections officer of the District of Columbia and a number of questions are propounded. All of the above demonstrates that the trial judge in plaintiff's case not only disregarded the plain language of the Youth Corrections Act but failed to set forth the reasons for failing to do so.

5

At the time of sentencing the trial judge took into consideration past convictions of plaintiff even though he was a juvenile and was not represented by counsel. This cannot be done under *United States* v. *Tucker*, 404 United States 443 (1972). By this ruling a trial judge during the sentencing process cannot take into consideration any prior convictions when the accused was not represented by counsel. *United States* v. *Tucker* was reinforced by *Argersinger* v. *Hamlin*, 407 United States 25 and Argersinger was made fully retroactive by the very recent case of *Berry* v. *City of Cincinnati* decided by the Supreme Court of the United States on November 5, 1973. See also the recent case of *Brown* v. *United States of of America*, CCA 4 decided August 1, 1973 (72-1312). See also the frequently cited case of *Lipscomb* v. *Clark*, 468 F (2) 1321 CCA 5 (1972). This principle of law is fully retroactive.

6

Statements were elicited from the plaintiff while plaintiff was subject to the jurisdiction of the Juvenile Court and used against him. He was not advised of his constitutional rights nor was he told that he was not required to make any statement. However, he was interrogated relentlessly. All of this violated his constitutional rights. See *Kent* v. *United States*, 383 United States 1045.

7

The trial court ignored plaintiff's plea of insanity.

Plaintiff's contention was that he was of unsound mind at the time of the alleged offense. Considering the age of plaintiff that put the court on notice that this defense should have been carefully explored in accordance with due process of law. Three psychiatrists examined him at plaintiff's request and testified that he was of unsound mind at the time of the alleged offense. The record will show that the court thereupon appointed three psychiatrists to examine him at the D.C. Jail but could not say that he was or was not insane at the time of the alleged offense. The court did not follow through based on this inconclusive testimony.

A motion was made by plaintiff that he be sent to St. Elizabeth's Hospital for complete observation and evaluation to determine his mental status. This request was denied. Of course this was a violation of plaintiff's constitutional rights. See *Bush* v. *State of Texas*, 372 United States 586 (1963). Plaintiff's case is far more compelling than the case of Bush who was 64 years of age.

8

Plaintiff contends that Section 2255, Title 18, is unconstitutional. It will be recognized that when the Congress enacted Section 2255 it had in mind liberalizing the

writ of habeas corpus—making it more accessible to one deprived of his liberty through violation of his constitutional rights. It has had the opposite effect. Had plaintiff been permitted to proceed by habeas corpus he would have had an evidentiary hearing many years ago. The government would have had to respond and make answer within 13 days at the latest and then there would have been a hearing and plaintiff would have been able to testify as to the violation of his constitutional rights and the court would have to release him—or award a new trial—if he supported his contentions which plaintiff could have done. Now what happens under Section 2255. It is treated as a civil action and the government is allowed 60 days to answer. Invariably the government gets additional time. The plaintiff is then given an opportunity to file an additional pleading. It then goes on the civil calendar to await its call for trial. Thus months and years can go by without a hearing—no matter how vital the points raised. This practice amounts to a virtual suspension of the writ of habeas corpus. There is then a virtual escape clause since the case goes back to the same judge. He can get around it by saying "the files and records conclusively show that the plaintiff is entitled to no relief." It is a rare judge indeed who will admit he made a mistake. Even if Section 2255 is utilized the matter should not go back to the same judge. These matters should go to another judge. It is well stated in *Halliday* v. *United States*, 380 Fed (2), 279 CCA 1 (1967):

> "In any event as unpleasant as it might be for a judge to testify we consider it far worse that he should be the trier of fact to determine his own credibility."

It seems strange indeed that the matter of the virtual suspension of the writ of habeas corpus in 2255 proceedings has never been passed upon by the Supreme Court.

Since plaintiff now challenges the constitutionality of Section 2255 his case may be the one for the Supreme Court to rule on this important question. As a matter of fact the Ninth Circuit in *Hayman* v. *United States*, 187 Fed (2) 456 (1951) seemed to pave the way for a constitutional test. It held 2255 unconstitutional but the Supreme Court dodged the constitutional point by reversing on other grounds. This is indeed a vital issue and has not been given the proper attention by text book writers and law school periodicals. The matter has got to be resolved—but when? *Sanders* v. *United States*, 373 United States, 1, said that in a 2255 proceeding the Congress intended to provide a remedy *exactly commensurate with that which had been available by habeas corpus.* In 59 *Yale Law Review* 1183 (1960) in dealing with the inadequacy of Section 2255:

> "if the motion is to replace habeas corpus in any given case it must provide an equivalent remedy . . . ."

In *Glynn* v. *Donnelly*, 470 Fed (2) 95 CCA 1 (1972) the court said:

> "Habeas corpus procedure is set out in 28 U.S.C. 2243. That section sets time limits for issuance of show cause orders and for holding hearings and in general manifests a policy that although civil in nature habeas corpus petitions are to be handled promptly."

Since plaintiff in this proceeding challenges the constitutionality of Section 2255 as virtually suspending the writ of habeas corpus it is to be hoped that the court will rule promptly on this contention.

• • • •

Plaintiff expresses the hope that this court will rule expeditiously on his complaint. Plaintiff ventures the prediction if this complaint is immediately given to the

Solicitor General of the United States he will cut through the red tape and order plaintiff's immediate relief.

Plaintiff has not the slightest doubt that he has fully met the criteria set forth in *Green* v. *United States*, supra:

> "His detailed allegations must be such that if the details were proved and not contradicted a court would be justified in setting aside the sentences."

It must not be overlooked that *United States* v. *Lookretis*, 398 Fed (2) 64 is authority for the proposition that once a constitutional infraction has been shown the government must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict complained of.

Judge Weinfeld of the United States District Court for the Southern District of New York has stated the matter well:

> "One imprisoned under a void judgment is just as properly deprived of his liberty as the most innocent person. Further the law presumes innocence until a valid judgment of conviction is entered. A judgment void ab initio does not become vitalized by mere passage of time and if void when entered is void for all time."

As to the claim of finality so often interposed by prosecuting and judicial officers, it is well to keep in mind the words of Chief Justice Burger when he sat on the Court of Appeals in *Bostic* v. *United States*, 293 Fed (2) 681:

> "I agree that the passage of time whether five years or twenty-five years cannot affect a valid claim under Section 2255. That is what Congress intended and that is what it should be."

One must never be condemned for utilizing every legal device available to erase an unlawful conviction. Let us

take the case of Judge Kerner, Circuit Judge of the Seventh Circuit. He is fighting his convictions to the hilt and still drawing his salary. One can easily suppose th the former Vice President—if he did not burn his bridges behind him by pleading guilty—would have fought to the limit. Then again, Justice Fortas of the Supreme Court, who was permitted to resign to escape prosecution for bribery, would have used every maneuver at his command had he been indicted.

Respectfully submitted,

WALTER STEVE BRACKETT
Box P.M.B., No. 0-4414-134
Atlanta, Georgia 30315

Opposition to Motion to Set Aside and Vacate Judgment of Conviction, August 6, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-742

(Criminal No. 953-60)

WALTER STEVE BRACKETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

OPPOSITION TO MOTIONS TO SET ASIDE AND VACATE JUDGMENT OF CONVICTION

Comes now the United States, by its attorney, the United States Attorney for the District of Columbia, and in opposition to the motion to vacate sentence pursuant to 28 U.S.C. § 2255, filed May 16, 1974 represents to the Court the following:

1. In September 1960 petitioner was a resident of the National Training School for Boys of the District of Columbia, having been committed there as a delinquent by the Juvenile Court of the District of Columbia. On September 11, 1960, William Lattimer, an officer at the Training School was killed in an escape attempt from the institution by petitioner and two other boys committed there. The escape attempt being unsuccessful, petitioner remained in custody at the Training School, now pursuant to homicide charges. On October 19, 1960, jurisdiction over petitioner and two co-defendants (with

respect to this offense) was waived by the Juvenile Court of the District of Columbia.[1] An indictment was then returned against petitioner and his two co-defendants on November 7, 1960, in the United States District Court for the District of Columbia (Criminal Case Number 953-60) on first degree murder (D.C. Code § 22-2401 (1951)) and murder of an officer and employee of the United States (18 U.S.C. § 1114). Petitioner entered an initial plea of not guilty to these charges.

It appears[2] petitioner was given a mental examination at the request of his attorney by Dr. Sol Charen on November 28, 1960. Upon government's subsequent motion for mental examination (for purposes of both the issues of competency and the insanity defense), such an examination was ordered by the court on January 13, 1961.[3] The result of this examination showed that petitioner was competent to stand trial and that the commission of the offense had been a product of his "psychological makeup".[4]

Trial in petitioner's and his two co-defendants' case began on January 30, 1961. Selection of a jury and opening statements by the government and petitioner's

---

[1] Petitioner was 14 at the time of the offense and was 15 at the time of trial.

[2] This representation appears as an allegation in the government's motion for a mental examination of petitioner dated December 19, 1960.

[3] Petitioner filed a written opposition to this motion on December 21, 1960.

[4] Initially the court ordered examination resulted only in a report that petitioner was competent to stand trial, an allegation which petitioner and his counsel had already asserted in opposition to the government's motion for the mental examination. Upon the court's further direction that the examining psychiatrist form an opinion as to petitioner's mental state at the time of the offense, it was the doctor's opinion that the "offense grew out of the patient's underlying psychological makeup. . .".

counsel were completed on the first day. On the second day of trial, January 31, 1961, prior to the jury's entering the courtroom, petitioner's two co-defendants withdrew their previous pleas of not guilty and entered pleas of guilty to voluntary manslaughter.[5] These pleas were accepted by the court and trial continued as to the petitioner. The evidence produced by the government on that second day of trial was directed to showing the fact of death and expert testimony as to the cause of death. The prosecution also called three of the boys from the Training School [6] who testified as eyewitnesses to petitioner's attack and beating of the guard which eventually led to the guard's death. Further government testimony from officers at the Training School was directed to the apprehension of petitioner upon the failure of the escape attempt.[7] Trial was adjourned for the day upon completion of this testimony.

At the beginning of the third day of the trial, petitioner withdrew his plea of not guilty and entered a plea of guilty to voluntary manslaughter. This plea was accepted by the court upon petitioner's notification of his rights [8] and his waiver of them.

---

[5] In entering his plea, one of the co-defendants offered to testify as a government witness as against petitioner.

[6] These three witnesses had not been involved in the escape attempt.

[7] The prosecutor specifically indicated to the court that he would not bring out testimony regarding any statements made by petitioner during this period. (Trial Transcript, hereinafter "Tr.", at 258-59.) The record reflects that there was no testimony regarding any statements.

[8] Defense counsel represented to the court that the petitioner had been fully advised of his rights and that he voluntarily desired to enter his plea. Additionally, the court expressly informed the petitioner that he was under no obligation to enter the plea and that he had the right to continue the trial and have a jury decide the case.

On March 10, 1961, petitioner came before the court for sentencing. Although petitioner's counsel specifically argued to the court for the imposition of a Youth Corrections Act sentence (S. Tr. at 2 [9]), the court specifically rejected such a sentencing alternative and instead sentenced petitioner as an adult to a term of five to fifteen years imprisonment.[10]

On December 10, 1969, petitioner filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255 in this court (Civil Action Number 3497-69). Petitioner alleged the court had no jurisdiction to accept his guilty plea because he was a juvenile and that the trial court failed to proceed properly with respect to his insanity defense. This court appointed counsel to represent petitioner. Since the appointment of counsel over four years ago no further action has been taken upon that case.

Petitioner is presently incarcerated in the Federal Penitentiary, Atlanta, Georgia.

2. In the present action, petitioner challenges the validity of his conviction. Specifically, petitioner alleges: (1) that the waiver of jurisdiction from the Juvenile Court in his case failed to afford him due process of law; (2) that he received ineffective assistance from his trial counsel in that petitioner was not informed of his rights to take an appeal; (3) that the sentencing judge failed

---

[9] "S. Tr." refers to the transcript of petitioner's sentencing on March 10, 1961.

[10] Petitioner was paroled from this sentence on August 1, 1967. He was then returned to federal custody as a parole violator on October 9, 1970, pursuant to two convictions in the state court in Montgomery, Alabama for forgery. Petitioner had received sentences of 13 to 15 months on each of these convictions. Petitioner was again paroled on May 15, 1972, but was again returned to federal custody as a parole violator on June 1, 1973, pursuant to conviction of possession of stolen property in the state court in Greenville, South Carolina. Petitioner received a sentence of ten years pursuant to this conviction.

to sentence him under the Youth Corrections Act and failed to state specific reasons for not doing so; (4) that in sentencing, the court took into consideration past convictions of petitioner when he was not represented by counsel; (5) that statements elicited from petitioner while he was subject to the jurisdiction of the Juvenile Court were used at his trial and were inadmissible; (6) that the court failed to accord petitioner due process with respect to his claim of insanity; and (7) that 28 U.S.C. § 2255 is an unconstitutional suspension of the writ of habeas corpus.

3. In response to petitioner's claim that the waiver of jurisdiction from the Juvenile Court did not comply with due process, respondent submits petitioner is entitled to no relief. Petitioner relies on *Kent* v. *United States*, 383 U.S. 541 (1966) (waiver of juvenile court jurisdiction valid only if hearing and counsel provided) and *Kemplen* v. *Maryland*, 428 F.2d 169 (4th Cir. 1970) (*Kent* applied retroactively). Respondents submit that the *Kent* requirements do not apply to waiver of jurisdiction in petitioner's case since it occurred five years prior to the *Kent* decision. Although *Kent* has been made retroactive by the Fourth Circuit as petitioner indicates, the rule in this circuit is clear that *Kent* is not to be applied retroactively. *Mordecai* v. *United States*, 137 U.S. App. D.C. 189, 195, 421 F.2d 1133, 1139 (1969), *cert. denied*, 397 U.S. 977 (1970).

4. With respect to petitioner's claim that he received ineffective assistance from his trial counsel inasmuch as he was not informed of a right to appeal, respondent submits that since petitioner entered a guilty plea he waived any rights to appeal and hence is entitled to no relief on this allegation. Petitioner alleges also that he relied on counsel's advice to enter a guilty plea but now claims he was induced to do so through "misrepresentation and subterfuge." No facts are alleged in support

of this claim. Respondent submits that without indicating more specifically how he was misled or prejudiced, these allegations must be considered insufficient as stating any grounds for relief. *Sanders* v. *United States*, 373 U.S. 1, 19 (1963); *Torres* v. *United States*, 469 F.2d 651 (9th Cir. 1972); *United States* v. *Lowe*, 367 F.2d 44 (7th Cir. 1966); *Martinez* v. *United States*, 299 F.2d 254 (6th Cir.), *cert. denied*, 371 U.S. 863 (1962); *Wilkins* v. *United States*, 103 U.S. App. D.C. 322, 258 F.2d 416 *cert. denied*, 357 U.S. 942 (1958).

5. Respondent submits that petitioner is entitled to no relief on his claim that sentencing was improper with respect to the consideration of the Youth Corrections Act and the failure to state reasons why petitioner was not sentenced thereunder. The recent opinion of the Supreme Court in *Dorszynski* v. *United States*, —— U.S. ——, No. 73-5284, decided June 26, 1974, is dispositive of petitioner's contention.[11] *Dorszynski* clearly indicates that a court need not state the reasons why it does not sentence pursuant to the Youth Corrections Act in a particular case.

6. With respect to petitioner's claims regarding the sentencing judge's taking into consideration past con-

---

[11] Even before *Dorszynski*, respondent submits that petitioner's reliance on *United States* v. *Coefield*, 155 U.S. App. D.C. 205, 476 F.2d 1152 (1973) is misplaced. Petitioner's sentencing occurred twelve years prior to the holding of *Coefield*. No authority has been cited that the *Coefield* rule is to be given retroactive effect. Finally, respondent submits that in view of petitioner's present age, 28 no relief by way of the Youth Corrections Act is now available to him. In a similar case dealing with the potential application of a Youth Corrections Act sentence to a petitioner who was no longer a juvenile, the court in *Mordecai* v. *United States*, 137 U.S. App. D.C. 189, 421 F.2d 1133 (1969), *cert. denied*, 397 U.S. 977 (1970) (Bazelon, C.J.) noted:

> "Even if nonpunitive rehabilitation in the juvenile process would have been the proper path in 1961, society can no longer offer what was then, rightly or wrongly, denied." 137 U.S. App. D.C. at 194, 421 F.2d at 1138.

victions of petitioner when he was not represented by counsel and claims that statements made by petitioner while in the jurisdiction of the Juvenile Court were inadmissible, respondent submits that petitioner is entitled to no relief. Without indicating more specifically what prior convictions or what statements or under what circumstances they were made, these allegations must be considered insufficient as stating any grounds for relief. *Sanders* v. *United States*, 373 U.S. 1, 19 (1963); *Torres* v. *United States*, 469 F.2d 651 (9th Cir. 1972); *United States* v. *Lowe*, 367 F.2d 44 (7th Cir. 1966); *Martinez* v. *United States*, 299 F.2d 254 (6th Cir.), *cert. denied*, 371 U.S. 863 (1962); *Wilkins* v. *United States*, 103 U.S. App. D.C. 322, 258 F.2d 416, *cert. denied*, 357 U.S. 942 (1958). Moreover, it is noted that with respect to the claim of inadmissible statements, by entering a guilty plea, petitioner waived the right to challenge these alleged infirmities. Finally, as noted in the earlier statement of facts, the prosecution carefully avoided bringing into evidence any statements which might have been made by petitioner. (Tr. at 258-59).

7. In response to petitioner's claim that he was not accorded due process with respect to his insanity claim, respondent submits that since petitioner entered a plea of guilty during the presentation of the prosecution's case in chief. Consequently, the issue of an insanity defense was never before the court. Petitioner further alleges that the court denied his motion to be sent to Saint Elizabeths Hospital for observation and evaluation of his mental status. Respondent submits that the record shows no indication that any such motion was ever made. To the contrary, the record reflects that petitioner alleged he was competent to stand trial and that he opposed the government's motion for observation and evaluation of his mental state.

8. Petitioner's final contention is that 28 U.S.C. § 2255 is an unconstitutional suspension of the writ of habeas corpus.[12] The weight of authority clearly indicates § 2255 suffers no such constitutional infirmity. *Cantu* v. *Markley*, 353 F.2d 696 (7th Cir. 1965); *Stirone* v. *Markley*, 345 F.2d 473 (7th Cir.), *cert. denied*, 282 U.S. 829 (1965); *Madigan* v. *Wells*, 224 F.2d 577 (9th Cir.), *cert. denied*, 351 U.S. 911 (1955), *United States* v. *Anselai*, 207 F.2d 312 (3d Cir.); *cert. denied*, 347 U.S. 902 (1953); *Close* v. *United States*, 398 F.2d 144 (4th Cir.), *cert. denied*, 344 U.S. 879 (1952); *St. Clair* v. *Hiatt*, 83 F. Supp. 585 (D.C. Ga.), *aff'd*, 177 F.2d 374 (1949).

WHEREFORE, it is respectfully submitted that the motion to vacate be denied on the ground that the motion, files and records in this case conclusively show that petitioner is entitled to no relief.

/s/ Earl J. Silbert
EARL J. SILBERT
United States Attorney

/s/ Oscar Altshuler
OSCAR ALTSHULER
Assistant United States Attorney
4267036

---

[12] Respondent notes the logical inconsistency posed by a challenge to the constitutionality of § 2255 in a motion made pursuant to that section. *Close* v. *United States*, 198 F.2d 144 (4th Cir.), *cert. denied*, 344 U.S. 879 (1952).

Order of the District Court denying petitioner's request to proceed *in forma pauperis*, August 29, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-742

Criminal No. 953-60

WALTER STEVE BRACKETT

vs

UNITED STATES OF AMERICA

ORDER

This matter is before the Court on petitioner's Notice of Appeal from this Court's Order of August 5, 1974, denying petitioner's § 2255 petition. Pursuant to Rule 24 of the Federal Rules of Appellate Procedure, this Court will not certify that this appeal is taken in good faith. Subsequently, this Court similarly denies the petitioner the right to proceed in *forma pauperis*.

Petitioner raised several issues in his § 2255 Motion, each of which the respondent replied to fully and amply. (See Respondent's Opposition. . . . at 5-9). The Court will not repeat each allegation, but adopts the responses filed by respondent.

Additionally, the Court notes that petitioner continues to serve time on *this* criminal conviction merely because he has twice violated his parole. Petitioner was sentenced to 5-15 years on March 10, 1961, after having entered a plea of guilty to voluntary manslaughter. Thereafter, petitioner was paroled from the sentence at issue on August 1, 1967. He was returned to federal custody as a

parole violator on October 9, 1970, pursuant to two state court convictions for forgery. Petitioner received 13-15 months on each of these convictions. Petitioner was reparoled May 15, 1972, but was again returned as a parole violator on June 1, 1973, pursuant to a state court conviction for possession of stolen property. His sentence for this conviction was 10 years.

It appears to this Court that allowing petitioner to proceed on appeal in *forma pauperis* would be a gross waste of judicial time and taxpayer money. Petitioner has presented absolutely no issue which would merit further review. Furthermore, even if (and this Court is confident it could never happen) petitioner could advance an argument with merit, it would make no difference. Petitioner is serving a 10 year sentence independent of any action taken by this Court.

For the foregoing reasons, it is by the Court this 28th day of August 1974,

ORDERED that petitioner's Motion to Proceed in *Forma Pauperis* should be and hereby is denied.

/s/ June L. Green
JUNE L. GREEN
U. S. District Judge